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No. 98-431

In The

Supreme Court of the United States

October Term, 1998

ADAN MELENDEZ AND ROSE MELENDEZ,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondent City of Los Angeles does not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

At all times relevant to this case, California Penal Code section 70, subdivisions (a) and (d), read as follows:

> "(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.
>
> . . . .
>
> (d) Nothing in this section precludes a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer, and exercising the powers of a peace officer concurrently with that employment, provided that all of the following are true:
>
> (1) The peace officer is in his or her police uniform.

(2) The casual or part-time employment as a private security guard or patrolman is approved by the county board of supervisors with jurisdiction over the principal employer or by the board's designee or by the city council with jurisdiction over the principal employer or by the council's designee.

(3) The wearing of uniforms and equipment is approved by the principal employer.

(4) The peace officer is subject to reasonable rules and regulations of the agency for which he or she is a peace officer and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code.

Notwithstanding the above provisions, a peace officer while off duty from his or her principal employment and outside his or her regular employment as a peace officer of a state or local agency shall not exercise the powers of a police officer if employed by a private employer as a security guard during a strike, lockout, picketing, or other physical demonstration of a labor dispute at the site of the strike, lockout, picketing, or other physical demonstration of a labor dispute. The issue of whether or not casual or part-time employment as a private security guard or patrolman pursuant to this subdivision is to be approved shall not be a subject for collective bargaining. Any and all civil and criminal liability arising out of the secondary employment of any peace officer pursuant to this subdivision shall be borne by the officer's principal employer. The principal employer may require the secondary employer

to enter into an indemnity agreement as a condition of approving casual or part-time employment pursuant to this subdivision.

It is the intent of the legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal.3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform approved by the principal employer, as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment."[1]

STATEMENT OF THE CASE

Respondent City of Los Angeles respectfully submits that the published opinion of the California Court of Appeal contains an accurate description of the proceedings below. Pet. App. 1-5. However, because petitioners have discussed the facts and legal proceedings at length, but not always correctly, the City will provide a brief overview of the case. This overview will highlight the inaccuracies in petitioners' account and also show that

[1] Stats. 1997, c. 452, deleted the phrase "and within the provisions of subdivisions (k) and (l) of Section 7522 of the Business and Professions Code" at the end of the first paragraph of the statute, and substituted "shall" for "may" following "principal employer" in the fourth sentence of the second paragraph. Neither change affects the analysis in the present case.

the petition is misleading regarding the grounds on which the Court of Appeal reversed judgment on the only federal claim presented to the jury.

A. Procedural Facts.

This case arose when Thomas Burris and Stephen Oskierko, two off-duty Los Angeles Police Department ("LAPD") officers working as security guards, injured petitioner Adan Melendez. Pet. App. 1. Melendez and his wife Rosa subsequently sued Burris, Oskierko and the City of Los Angeles ("City") under both state and federal law. The case went to the jury against all defendants on Adan Melendez' state law battery and negligence claims, and his wife's loss of consortium claim, which was based on Melendez' battery and negligence claims. Pet. App. 5; Reporter's Transcript ("RT") 2091:4-16; Appellant's Appendix ("AA") 178. The case also went to the jury on Adan Melendez' federal law claim brought pursuant to 42 U.S.C. section 1983 ("section 1983"). Pet. App. 5.

The jury found for Adan Melendez on his state claims and on his federal law claim. As reduced to judgment, his award was $9,250,000 less a good faith settlement of $550,000 for a total of $8,700,000. Pet. App. 5. The jury also found for Rosa Melendez on her loss of consortium claim, awarding her $750,000 against the City and Burris, and $750,000 against the City and Oskierko. Pet. App. 5. The City appealed. Pet. App. 5.

The California Court of Appeal reversed with directions to enter judgment in favor of the City. Pet. App. 24. The court held that Adan Melendez' state law claims were precluded by California Penal Code section 70(d)

("section 70(d)") which provides that off-duty officers working as private security guards cannot exercise peace officer powers unless they comply with certain conditions, including wearing a uniform and securing their principal employer's permission to work the assignment. Pet. App. 16. The Court of Appeal found, and petitioners do not dispute, that Burris and Oskierko did not comply with these conditions. Pet. App. 18-19; Pet. 18, n.5. For this reason, the Court of Appeal held that neither man was acting as a peace officer when Melendez was injured. Pet. App. 18-19. Therefore, the City could not be held liable on a state law respondeat superior or direct negligence theory. Pet. App. 19-20.[2]

The Court of Appeal also reversed the jury verdict on Adan Melendez' section 1983 claim. The court did so for two wholly independent reasons, stating:

> "The injury suffered by respondents did not flow from any state policy or custom. *Nor was there a state actor whose actions triggered the statute.* Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala restaurant." Pet. App. 23, emphasis added.

Significantly, petitioners misquote this passage by omitting the italicized sentence without even providing

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[2] Because Rosa Melendez' state law loss of consortium claim derived from Adan Melendez' now-defunct state law claims, which cannot be and are not a subject of this petition, she is not a proper petitioner.

ellipses. Pet. 19.[3] By doing so, petitioners evidently hope to mislead this Court into believing that the Court of Appeal found causation lacking because Burris and Oskierko were not acting under color of law. As the full quotation shows, however, the court held there was no causation for the completely different reason that Melendez' shooting "did not flow from any state policy or custom." Pet. App. 23. As will be discussed below, the existence of this independent ground for the court of Appeal's decision on Melendez' section 1983 claim in and of itself requires that this petition be denied.

B. Substantive Facts.

Thomas Burris and Stephen Oskierko were LAPD officers. On the night of the incident that gave rise to this case, they were off duty and working a private security job. Pet. App. 2-3. LAPD officers are required to obtain their commanding officer's approval for outside employment "each time the nature or location of the work to be performed changes." AA 686. The commanding officer must certify that an investigation has shown "the employment is not of the prohibited type . . . " *Id.* Neither officer had secured the LAPD's permission to work this job and neither officer was in uniform. Pet. App. 3.

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[3] Petitioners quote the passage as follows: "The injury suffered by respondents did not flow from any state policy or custom. *Neither Burris nor Oskierko was acting as a peace officer or in any other public capacity in connection with the events at the Gala Restaurant.*" Pet. 19.

The private security job involved protecting the proceeds of an underground party organized by Laslo Borzai. Pet. App. 2-3. Such illegal gatherings are "set up somewhere in downtown L.A.," "they serve alcohol to anybody," and "just about anything goes." RT 229:17-24 and 434:24-433:4. The admission charge to this party was $20.00 per person. Pet. App. 2.

Borzai rented the Gala Restaurant, owned by the Tassop Family Trust, to serve as the location where tickets would be sold. Pet. App. 2. The restaurant was open only for that purpose. RT 592:7-593:5. The restaurant manager, Tassop, had been told to keep the place open until 12:30 or 1:00 a.m. Pet. App. 22. The restaurant opened for ticket sales at about 9:00 p.m., and sales began shortly thereafter. A table was set up at an entrance to the restaurant, facing a parking area. Customers approached the table to buy tickets. Two young women sold the tickets. Pet. App. 2.

Adan Melendez, along with some friends, purchased tickets at the Gala and went to the party. When they arrived, the party was being broken up by police. They turned around and went back to the restaurant to obtain refunds. Pet. App. 3. When they arrived there, at about midnight, tickets were still being sold. Pet. App. 22. People wanted their money back, but the ticket sellers, one of whom was gripping a cash box, refused to provide refunds. Pet. App. 3, 22; RT 362:1-2 and 362:26-28.

Burris and Oskierko were still acting as security guards at this time even if their only assignment was to

"guard the money." Pet. App. 22.[4] Each was armed with an LAPD-approved pistol and each had his official badge attached to his belt. Pet. App. 3. Burris was wearing his badge in such a manner that it was not apparent until he swept his jacket back. Augmentation to Reporter's Transcript ("AUG") 96:3-5. Instead of an LAPD uniform, each man wore casual clothes and a blue nylon jacket on which the word Security was printed in large white letters, front and back. Pet. App. 3. Burris and Oskierko had been drinking, and each had a sufficiently high blood alcohol level to be presumed under the influence at the time the incident giving rise to plaintiffs' action occurred. RT 1017:11 to 22; 1018:24 to 1019:10; California Vehicle Code, section 23155.

Burris and Oskierko approached the entrance area, telling the people to be on their way. Pet. App. 3. However, people in the crowd said, "They're security guards,

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[4] Petitioners assert that Burris and Oskierko had "no other work to do" after they escorted a courier off-premises with money collected before midnight. Pet. 9. As the Court of Appeal's opinion demonstrates, this contention is incorrect because tickets were still being sold after that time, so Burris and Oskierko were still fulfilling their function as security guards, which was to guard the money. Contrary to other assertions made by petitioners (Pet. 10), there was a line of ticket buyers in the parking lot, as well as a cash box on the premises. RT 188:26-189:29, 360:23-361:1, 362:1-2, 362:26-28, 615:8-25. Thus, even if tickets were not being sold at the precise moment Melendez was shot, the premises contained money Burris and Oskierko had been hired to protect, so plaintiffs are simply wrong in asserting that a "significant amount of time . . . elapsed between Burris' and Oskierko's last services as private security guards and the time Melendez was shot." Pet. 11.

they can't do shit." RT 1522:8-9. Oskierko and Burris identified themselves as police officers, and Burris swept back his jacket displaying his badge and gun. But the group of customers kept pressing forward, some yelling that the two were only security officers, not police. Oskierko drew his weapon and fired several shots at the ceiling. Pet. App. 3-4. After firing his weapon, Oskierko pointed his gun at the crowd and said, "Stay the fuck back. Get the fuck back." RT 453:1-7. Someone said the shots were blanks, and Oskierko then fired a round into the overturned table or into the floor. Pet. App. 4. The crowd initially stepped back, then Hogan and several other people, including Melendez, entered the restaurant. RT 457:24 to 458:11; 460:26 to 461:1; 927:11-20. Oskierko and Burris retreated. RT 458:14-27. Melendez approached Oskierko, who kicked at Melendez, making contact with his forearms. RT 768:1 to 769:14. Right after the kick, Burris shot Melendez, rendering him a paraplegic. RT 64:13-19; 772:7-13; 1192:8-11. The confrontation and shooting occurred shortly after midnight. AUG 85:21 to 86:4; RT 567:7-15. After the shooting, Burris handcuffed Melendez. Pet. App. 4.[5]

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[5] Petitioners assert that "[t]he LAPD sought felony charges against Melendez. . . . " Pet. 13. However, nothing in the record supports this statement. The Los Angeles County District Attorney's Office filed charges against Melendez (AA 685), but that office is an agency of the state. *Pitts v. County of Kern*, 17 Cal.4th 340, 345 (1998) ("The district attorney represents the state . . . when preparing to prosecute and when prosecuting crimes.")

REASONS FOR DENYING THE WRIT

This writ should be denied because petitioners' issues do not meet the threshold criteria for certiorari, and petitioners are wrong on the merits.

A. The Court of Appeal's Finding That Causation was Lacking as a Matter of Law Does not Meet the Threshold Criteria for Granting Certiorari; Moreover the Court was Right on the Merits.

As noted above, the Court of Appeal had two wholly independent grounds for reversing judgment on Adan Melendez' federal claim.[6] One reason was that there was no "state actor whose actions triggered the statute." Pet. App. 23. The other was that "[t]he injury suffered by respondents did not flow from any state policy or custom." *Id.* As the court explained, a government entity cannot be held liable

> " . . . solely because it employs an errant officer; '[i]nstead, it is when execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, *inflicts the injury* that the government as an entity is responsible under section 1983.' " Pet. App. 23, emphasis added.

In short, the Court of Appeal concluded that causation was lacking even if Burris and Oskierko had been acting under color of law. Questions concerning the persuasiveness and substantiality of the evidence do not

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[6] As also noted above, Rosa Melendez had no federal cause of action.

constitute an "important federal question" justifying this Court's review on certiorari. *Donaldson v. United States*, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971). For this reason alone, the issue is unworthy of review.

Moreover, the Court of Appeal was correct on the merits. In order to recover on a section 1983 lawsuit against a municipal entity, there must be a "direct causal link between" a City policy, custom or practice and plaintiff's injuries. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). The policy must be the "moving force behind the constitutional violation" and "closely related to the ultimate injury." *Id.* at 489 U.S. pp. 389, 391 [109 S.Ct. at pp. 1205, 1206, internal brackets and quotation marks omitted]. As in *City of Canton, Ohio*, plaintiffs here were required to demonstrate that their injuries would "have been avoided" had it not been for the allegedly deficient policy, custom or practice. Cf. *id.* at 489 U.S. p. 391 [109 S.Ct. at p. 1206].

Plaintiffs failed to make such a showing. Plaintiffs adduced evidence that the City had a custom or practice of condoning the use of excessive force and failing to discipline officers. However, plaintiffs adduced *no* evidence that a change in this policy would have affected Burris and Oskierko's decisions to work in violation of departmental regulations, ingest significant quantities of alcohol and use deadly force without *any* justification. Given these circumstances, no jury could have reasonably concluded that Burris' and Oskierko's conduct was "closely related" to an LAPD practice of tolerating excessive force. The conclusion of the California Court of Appeal neither abrogates nor ignores federal law, since

causation in federal civil rights cases may also be decided as a matter of law if insufficient evidence is presented to justify submission to the jury. See, e.g., *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) [peace officer's "considerable disciplinary record" of complaints for "excessive and improper force and unwarranted violence in arrest and detention" did not as a matter of law "establish the necessary causal link between the [public entity's] policy and [plaintiffs'] injuries" incurred as a result of the officer's "free-lance criminal" behavior].

Recognizing, perhaps, the weakness of their request for certiorari because of this independent state ground upon which the decision below was based, petitioners compare their case to this Court's recent decision in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). They argue that this case is comparable with *Board of County Commissioners* (which respondent does not concede), and assert that certiorari should be granted in order to "explain" the latter case and reconcile any differences between the majority and dissenting opinions. Pet. 28. But *Board of County Commissioners* is a case about the quantum of evidence necessary to show deliberate indifference, not causation, and bears little or no resemblance to this case. No "clarification" in *Board of County Commissioners* (even if such were necessary) would thus result

from the analysis proposed by petitioners and certiorari is inappropriate.[7]

Contrary to petitioner's assertion (Pet. 25-28), this case is not comparable to *Board of County Commissioners*. The question addressed in *Board of County Commissioners* was "whether the county was properly held liable for [plaintiff's] injuries based on the [policy maker's] single decision to hire [the peace officer who injured plaintiff]." *Id.* at 117 S.Ct. p. 1387. The entire focus of the case was on the degree of culpability necessary to hold the public entity liable, and the Court concluded that deliberate indifference would be found only if the "plainly obvious consequence" of the alleged unconstitutional policy, custom or practice would be the deprivation of a third party's federally protected right. *Id.* at 117 S.Ct. p. 1392.

In contrast, the question in the case at bar is whether respondent could be held liable for a policy, custom or practice of allowing or condoning the use of excessive force by police officers (and specifically by Burris), when that policy was not, as a matter of law, the cause of

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[7] Petitioners also contend that this case is an "appropriate vehicle to re-examine the question whether liability may or should be imposed upon a municipality based upon principles of vicarious or respondeat superior liability,. . . . " Pet. 29. Such an examination would be pointless in the context of this case, however, since petitioner would lose even if this Court were to overrule *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) on this issue. Since Burris and Oskierko were not "state actors" at the time of the shooting, there is no civil rights violation extant for which respondent could be found vicariously liable.

plaintiff's injuries. Tolerating excessive force is not equivalent to tolerating peace officers working in violation of department regulations, ingesting significant quantities of alcohol and using deadly force without any justification. Correcting the claimed "deficiencies" in the LAPD's practices regarding excessive force would not have resulted in Burris and Oskierko refraining from working illegally, becoming intoxicated and using deadly force without any justification, all acts which were obviously flagrantly improper. (Cf. *Harlee v. Hagen*, 538 F.Supp. 389, 397 (E.D.N.Y. 1982) [court notes that "[b]eating an individual with a revolver is rarely, if ever, an appropriate act by an officer" in rejecting *Monell* claim based on failure to train, supervise or discipline]. See also *Kasarda v. Tomasch*, 530 F.Supp. 1346, 1347-1348 (N.D. Ohio 1982) [no *Monell* liability for off-duty peace officer's actions as a security guard because city did not supervise this employment, so there was "no causal connection between the alleged policy of the city and the injuries sustained by the plaintiff"].)

In short, this is not the case to support a re-examination of the deliberate indifference issues addressed in *Board of County Commissioners of Bryan County, Oklahoma v. Brown, supra*. Absent any causative link between the policy of allowing or condoning the use of excessive force and the injuries sustained in this case, respondent's alleged deliberate indifference to the constitutional violations caused by the use of excessive force is irrelevant. Certiorari is therefore not warranted and the petition should be denied.

B. The Court of Appeal's Determination that Burris and Oskierko did not Act Under the Color of Law was Correct and Does not Conflict with Federal or State Law.

Petitioner argues that the Court of Appeal has "eviscerated" the federal "color of law" provision in section 1983 (Pet. 21) by holding that the police officers in this case were not state actors because neither was "acting as a peace officer nor in any other public capacity in connection with the events of the Gala Restaurant." Pet. App. 23. Whether a person is a "state actor" involves the same "ultimate issue" as whether they acted under "color of state law" within the meaning of section 1983. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982). The issue presented by this holding is not worthy of a grant of certiorari, however, because at most, the Court of Appeal misapplied existing law. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994). Moreover, it is clear that state authority is a requisite to state action under section 1983 and the Court of Appeal's opinion was thus correct on the merits.

As this Court has noted, a person acts under color of state law when he or she "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is *clothed with the authority of state law.*' " *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988), emphasis added. Thus, "a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *Id.* at 49-50 [108 S.Ct. at 2255].

Because Burris and Oskierko did not comply with Penal Code section 70, subdivision (d), they did not "exercis[e] the powers of a peace officer concurrently" when they were employed as private security guards at the Gala Restaurant. Under state law, they had no police authority, but could act simply on behalf of their private employer as a private citizen. Thus, they could not have "exercised power 'possessed only by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West*, 487 U.S. at 49, 108 S.Ct. at 2255. Nor could they have been "abus[ing] the position given to [them] by the state." *Id.* at 49-50, 108 S.Ct. 2255. Once they failed to comply with section 70, subdivision (d), they had no position conferred by state law; they were simply private actors. Burris and Oskierko could not have acted under the color of law and respondent could not be held liable under section 1983.

Although petitioner contends that the Court of Appeal's opinion conflicts with federal decisional authority (Pet. 21), the cases upon which petitioner relies define "color of law" in a manner perfectly consonant with the Court of Appeal's holding. In *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941), this Court defined the phrase "color of law" as follows: "Misuse of power, possessed by *virtue of state law* and made possible only because the wrongdoer is *clothed with the authority* of state law, is action taken 'under color of state law.' " (Emphasis added.) Burris and Oskierko could not possess power "by virtue of state law" because they were not "clothed with the authority of state law." Section 70 had stripped them of that authority during the time they were employed as private security guards.

The actual authority which Burris and Oskierko possessed while acting as private security guards was no greater than that of any two security guards not employed by the LAPD. This Court has made it clear that a police officer who *exceeds* his authority by performing an illegal act can be deemed to act under color of law, he cannot act under color of law if he has *no* authority to act as a peace officer. The Court enunciated this distinction in holding that state police officers who had beaten a man to death while arresting him acted under the color of law though they exceeded their authority. The Court observed:

> *"We are not dealing here with a case where an officer not authorized to act* nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective." *Screws v. United States*, 325 U.S. 91, 92, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495 (1945), emphasis added.

See also *Griffin v. State of Maryland*, 378 U.S. 130, 135, 84 S.Ct. 1770, 1773, 12 L.Ed.2d 754 (1964) ["if an individual *is possessed of state authority* and purports to act under that authority, his action is state action." Emphasis added].

Neither does the Court of Appeal's opinion "eviscerate" the federal jury instruction definition of "color of law." (Pet. 22.) This instruction states, in pertinent part:

> "In order for unlawful acts of an official to be done 'under color of any law,' however, the unlawful acts must be done while the official is

> purporting or pretending to act in the performance of his official duties; *that is to say*, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official *only* because he is an official. . . . " Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions (4th ed. 1987) § 103.04, p. 947, emphasis added.

Petitioner emphasizes the phrase "purporting or pretending to act in the performance of his official duties" while ignoring the fact that the instruction defines such "purporting and pretending" as an abuse of power which is possessed by the "official only because he is an official. . . . " In the present case, section 70 prohibited Burris and Oskierko from acting as officials, so there was no power to "purport or pretend" to misuse.

The Court of Appeal was correct on the merits. Moreover, even if it was not, the most that can be said is that the court misapplied settled law, and this is not a ground for certiorari. The cases cited by petitioner in support of his contention that the opinion is inconsistent with the federal definition of "color of law" are not in fact conflicting. Certiorari is therefore inappropriate and should be denied.

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CONCLUSION

For all of the above reasons, the petition for certiorari should be denied.

DATED: October 14, 1998

Respectfully submitted,

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